

injuries he suffered on August 24, 2000, while employed by respondent have left him permanently and totally disabled. Additionally, claimant argues the parties are subject to the KWCA because respondent advised claimant there was insurance coverage.

Respondent, however, requests the Board to affirm the Award. Respondent argues the evidentiary record proves that the relationship between claimant and respondent on claimant's date of accident was that of a principal/independent contractor and not in the nature of an employer/employee. Thus, respondent argues claimant is not entitled to benefits provided by the KWCA.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and the parties' arguments, the Board makes the following findings and conclusions:

On August 24, 2000, there is no dispute that claimant was injured when he fell from the second floor of a house he was roofing under an agreement with respondent. At the time of the fall, claimant suffered permanent injuries to both his lumbar and thoracic spine. Claimant was finally taken off work on December 27, 2000, and at the time of the regular hearing on July 16, 2001, claimant remained unemployed.

The threshold question in this case is whether the relationship between respondent and the claimant on claimant's date of accident was in the nature of an employee/employer or a principal/independent contractor. In order for the KWCA to apply to the parties, there must be a finding claimant and respondent had an employer/employee relationship.¹ The Board finds the ALJ's conclusion that respondent and the claimant had a principal/independent contractor relationship and not an employer/employee relationship should be affirmed. The Board also agrees with the ALJ's analysis of the evidence and with his detailed findings and conclusions that are set forth in the Award. It is, therefore, not necessary to repeat those findings and conclusions in this Order. The Board adopts those findings and conclusions as its own as if fully set forth herein.

In particular, the Board finds the record as a whole proves respondent did not exercise or did not have the right to exercise control over claimant to the extent necessary to make claimant respondent's employee. Claimant employed four employees and contracted with respondent to complete individual roofing jobs for respondent. Claimant was injured while completing one of the roofing contracts.

The Board agrees the greater weight of the evidence proves claimant was an independent contractor at the time of his accidental injury and not an employee of respondent.

¹ See K.S.A. 44-501(a); K.S.A. 44-505; K.S.A. 44-508(a), (b).

For the first time, on appeal, the claimant argued before the Board that the respondent advised the claimant that it had insurance for everybody. Claimant argues respondent should be subject to the KWCA because it should not be allowed to take advantage of misleading an illiterate claimant as to insurance coverage. The Board finds this issue and argument was not raised before the ALJ. Thus, the Board concludes, it does not have jurisdiction to review that issue for the first time on appeal.²

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that ALJ Bruce E. Moore's January 11, 2002, Award should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of January 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Rodney G. Nitz, Attorney for Claimant
C. Stanley Nelson, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge
Director, Division of Workers Compensation

² See K.S.A. 44-555c(a) ("The review of the board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge."). See also *Coffman v. State*, ____ Kan. App. 2d ____, 59 P.3d 1050 (2002) (estoppel is an affirmative defense that has to be raised and decided by the ALJ).

SABINO CERVANTES

4

DOCKET NO. 261,997

+